

ELLA M. PERRY,	: Order Affirming Decision
Appellant	:
	:
v.	: Docket No. IBIA 97-105-A
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NAVAJO AREA DIRECTOR,	:
BUREAU OF INDIAN AFFAIRS,	:
Appellee	: October 14, 1997

Appellant Ella M. Perry seeks review of that part of a January 29, 1997, decision issued by the Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), which consented to a right-of-way across Navajo Allotment No. 1628 in McKinley County, New Mexico, on her behalf. The right-of-way across Allotment No. 1628 was granted to the Navajo Tribal Utility Authority (NTUA) as part of a 40-mile right-of-way for a 115 kV transmission line from Coalmine Station, McKinley County, New Mexico, to Burnside Junction, Apache County, Arizona. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

On May 5, 1995, NTUA applied for a right-of-way for the transmission line, which was to be located in the Navajo "checkerboard" area. Most of the trust lands crossed by the proposed route for the transmission line are owned by the Navajo Nation (Nation). However, the proposed route also crosses Allotment No. 1628 and Allotment No. 1961 in Apache County, Arizona. The Nation and the owners of Allotment No. 1961 consented to the right-of-way. According to the Area Director's decision, 66 owners of Allotment No. 1628 also consented to the right-of-way. 1/

According to a June 2, 1995, limited appraisal report prepared by BIA, the appraised value of the right-of-way across Allotment No. 1628 was \$25 per rod, or a total of \$4,528.50 for the 181.14 rods which would cross the allotment. A meeting was held with NTUA, BIA, and the twelve owners of the allotment, including Appellant, who had refused to consent to the right-of-way. The non-consenting owners stated that they would consent if they were paid \$5,000 per family (a total of either \$45,000 or \$50,000) and were given free electrical hookups to their homesites off the allotment and reduced utility rates. The NTUA would not agree to those terms, but offered to pay Appellant and the other non-consenting owners twice the appraised value, with each owner receiving at least \$25. The total payment for the right-of-way across Allotment No. 1628 under this offer would come to \$9,058, of

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1/ The number of owners of Allotment No. 1628 has changed during the pendency of this matter. In 1995, there were apparently 98 owners. The Area Director's decision states that there were 92 owners as of Jan. 29, 1997. A BIA title report, dated July 15, 1997, shows 91 owners.

which Appellant would receive \$70.76. Appellant and the other non-consenting owners refused this offer. Other documents in the administrative record indicate that the demands of the non-consenting owners have remained consistent, and that they have refused to negotiate.

On January 29, 1997, the Area Director exercised the authority granted to him under 25 U.S.C. § 324 (1994) 2/ and 25 C.F.R. § 169.3(c), both quoted below, and consented to the right-of-way on behalf of owners of Allotment No. 1628 who were minors or non compos mentis (25 C.F.R. § 169.3(c)(1)), owners whose whereabouts were unknown (25 C.F.R. § 169.3(c)(3)), and the unprobated estates of deceased owners (25 C.F.R. § 169.3(c)(4)). On the same day, the Area Director informed Appellant that, under the authority of 25 U.S.C. § 324 and 25 C.F.R. § 169.3(c)(2), he had consented to the right-of-way on her behalf.

Appellant appealed from this decision. Briefs were filed by Appellant, the Area Director, and NTUA. Expedited consideration was requested and granted. 3/

Although Appellant raises several issues, the Board sees the central and dispositive issue as being straightforward: May "consents" given by BIA under 25 C.F.R. § 169.3(c)(1), (3), and (4) be included in determining whether a "majority" of landowners have consented to a right-of-way within the meaning of 25 U.S.C. § 324 and 25 C.F.R. § 169.3(c)(2)?

Section 324 of 25 U.S.C. provides in pertinent part:

Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Regulations implementing this section are found in 25 C.F.R. § 169.3:

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually

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2/ All further citations to the United States Code are to the 1994 edition.

3/ In an order dated July 25, 1997, the Board informed the parties that it would "make every effort to decide this case before September 15, 1997." The Board apologizes for its failure to meet this timeframe.

owned lands \* \* \* without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

(c) The Secretary may \* \* \* grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when

(1) The individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages;

(2) The land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant;

(3) The whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant;

(4) The heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or any owner thereof;

(5) The owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

Both the statute and the regulation authorize the Secretary to consent on behalf of undetermined heirs, owners whose whereabouts are unknown, owners who are non compos mentis, and owners who are minors. There is no dispute that the Area Director exercised the delegated authority of the Secretary here and consented to the right-of-way on behalf of owners in the categories just mentioned.

Appellant contends that the Area Director lacked authority to consent for her because the consenting owners owned less than a majority of the interests in the allotment. Although she acknowledges that the Area Director consented for those owners described in the preceding paragraph of this decision, Appellant apparently argues that only those owners who personally consented can be counted in determining whether a "majority" of owners have consented.

Appellant has presented no reasoning and has cited no precedent or other authority for her conclusion that consents granted by the Area Director on behalf of individual owners in the categories set forth in 25 C.F.R. § 169.3(c)(1), (3), and (4) cannot be counted in determining whether a "majority" of owners have consented to the right-of-way. The Board finds nothing on the face of either the statute or the regulation which requires this

conclusion, and it is not aware of precedent for construing the statute and/ or regulation in this way. It does conclude, however, that such a reading of the statute and regulation would significantly frustrate the continuing intent of Congress to facilitate the beneficial use of fractionated Indian lands.

In the absence of any attempt by Appellant to support her legal conclusion, the Board finds that she has failed to carry her burden of proving the error in the Area Director's decision, and therefore declines to construe 25 U.S.C. § 324 and 25 C.F.R. § 169.3(c) in the manner Appellant advocates.

The Board thus reaches the question of whether a majority of the owners of Allotment No. 1628 have consented to the right-of-way. In its Answer Brief, NTUA has compiled a list of the owners and their ownership interests. It states that this compilation is based on the Area Director's January 29, 1997, affidavit setting forth the names of those persons for whom he had consented. Because the Area Director's affidavit did not show the percentage interests owned by each person, NTUA obtained this information from a July 15, 1997, BIA title report, a copy of which is attached to its Answer Brief. Appellant has not objected to NTUA's use of a July 1997 title report, although the Area Director's decision was issued in January 1997. In the absence of any suggestion from Appellant that the ownership interests were significantly different in July 1997 than in January 1997, the Board relies on the July 1997 title report. 4/

The NTUA grouped owners based on whether the owner consented to the right-of-way, refused to consent, or was in one of the categories set forth in 25 C.F.R. § 169.3(c). The NTUA's compilation uses the figures shown in the "aggregate decimal" column of the title report. This column shows the ownership interest carried to the tenth decimal place. The NTUA provides totals for the ownership interests in each category.

Although she had an opportunity to do so in her Reply Brief, Appellant has not objected to any aspect of NTUA's compilation. The Board therefore bases its discussion on this compilation because it provides a summary of the ownership interests in a readable format. However, for purposes of its discussion in the text below, the Board converts the aggregate decimal ownership interests to percentages by moving the decimal point two spaces to the right and rounding off the percentages to two decimal places. 5/

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4/ The different figures for ownership interests used by the parties to this proceeding illustrate the need for all parties to be using the same title report, and for that report to be part of the administrative record.

5/ The Board notes one transcription error in NTUA's compilation. The interest owned by Dan Begay should have been listed as .0208333333, raising to .1499219350 the total interests owned by persons whose whereabouts were unknown.

Although the BIA title report accounts for 100 percent of the ownership interests, the interests shown on NTUA's compilation, as corrected above, account for only .9293270986 (or, 92.93 percent) of the whole, leaving unaccounted for interests of .0706729014 (or, 7.07 percent). Based on

Based on NTUA's compilation, the owners of 43.77 percent of Allotment No. 1628 personally consented to the right-of-way. This figure includes a 6.65 percent interest which is owned by the Nation. Appellant challenges the Nation's ownership of an interest in this allotment. The Board does not here consider whether Appellant has standing to challenge the Nation's ownership or the merits of her challenge. Instead, for purposes of this discussion only and in order to address Appellant's argument in the manner most beneficial to her, the Board excludes the Nation's interest from the following calculations. Thus for purposes of this calculation, the Board concludes that the owners of 37.12 percent of the allotment personally consented to the right-of-way.

After determining that the right-of-way would not cause substantial injury to the land or the owners--a finding which is required by 25 C.F.R. § 169.3(c)(1) and (4)--the Area Director consented to the right-of-way under those subsections on behalf of the owners of 26.12 percent of the allotment. When these interests are added to the interests of those owners personally consenting, the total ownership interest of consenting owners is 63.24 percent. Because this is a majority of the total interests in the allotment, the Area Director had authority to consent for Appellant under 25 U.S.C. § 324 and 25 C.F.R. § 169.3(c)(2), without even considering the 14.99 percent interest owned by individuals whose whereabouts were unknown.

In her Reply Brief, Appellant contends that the Area Director violated his trust responsibility to her by looking to the interests of the Nation and its members in having increased electrical capacity, rather than looking solely to her interests as an owner of Allotment No. 1628. She argues:

In considering the request for a transmission line right-of-way the Area Director is swayed by economic factors and that no environmental injury will occur, totally disregarding the concerns of the actual landowners and the value they place on the land. Acting on his trust responsibility to the landowner the Area Director determined the "value" of the allotment for a 25 year right-of-way lease is \$70.76 for Appellant \* \* \*. Income generated from the land is not equal to the value of the land. \* \* \* The Area Director makes no determination of the value of the land as considered by the landowners. The long term injury to the landowner is the reduced value of the allotment in terms of his or her ability to develop it at a later point in time. Land ownership, although a

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fn. 5 (continued)

its review of the title report, the Board finds that the following owners were omitted: Melvin Calvert Keeto, .0052083333; Henry Keeto, .0550595238; Helen Cayatineto, .0025227864; Estate of Leo Castillo, Sr., .0000697544; and Estate of John M. Wallace, .0078125000. These interests total .0706728979, leaving .0000000035 as transcription and/or mathematical error. The Board finds this difference too minor to warrant further investigation.

For purposes of this discussion, the Board assumes that the omitted interests plus an interest of .0000000035 are held by non-consenting owners--an assumption which gives the benefit of the doubt to Appellant.

foreign concept to Navajo people, is a valued commodity and for the Area Director to dismiss the landowners concerns violates his trust responsibility.

Reply Brief at 2-3.

Although the Area Director did address benefits to be derived by the Nation and other tribal members, his decision and the administrative record show that the value of Allotment No. 1628 was considered in determining whether to consent to the right-of-way on behalf of the non-consenting owners. Both of these documents note that the allotment is already crossed by a 115 kV transmission line owned by the Public Service Company of New Mexico (which NTUA's line would parallel), that no non-consenting owner resides on the allotment, and that the allotment has no water source and is therefore unlikely to be further developed in the future. The Area Director also had information indicating that the reasons Appellant had consistently given for refusing to consent during negotiations with NTUA were economic, rather than based on any intrinsic value she placed on the land. The Board concludes that the Area Director did not violate his trust responsibility to Appellant by consenting to the right-of-way on her behalf.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Navajo Area Director's January 29, 1997, decision is affirmed. 6/

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Kathryn A. Lynn  
Chief Administrative Judge

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Anita Vogt  
Administrative Judge

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6/ Because of this disposition, consideration of other arguments which Appellant raised was deemed unnecessary.

All motions not previously addressed are hereby denied.